Supreme Court, U.S.
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in the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-2784

THERESA M. BODNAR,

Petitioner,

vs.

CATHERINE BODNAR, MARGARET BODNAR, individually and as Administratrix of the Estate of MARY H. BODNAR, Deceased, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, THERESA BODNAR, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit, to review the Judgment and Opinion

of said Court, dated April 28, 1971, entered after rehearing was denied on May 25, 1971, which affirmed the judgment of the District Court of the United States for the Southern District of Florida, Miami Division, entered on January 26, 1970.

Petitioner alleges the following:

(a) A transcript of the record in said District Court was filed with the Clerk of said Court of Appeals and it consisted of all of the original record in said District Court, as provided by Rule 10 of the Rules of Appellate Procedure.

(b) The said Original Record was destroyed by fire after its filing in said Court of Appeals, and the Clerk of said Court so notified all attorneys of record by letter dated June 3, 1971, in which was enclosed a certified copy of the Opinion and Judgment sought to be reviewed. A copy of said Opinion and Judgment is attached to this Petition and a copy of said letter of June 3, 1971 is attached to this Petition.

(c) The said Opinion and Judgment of said Court of Appeals has not as yet been reported in any official or unofficial reports of opinion.

(d) Prior to said destruction of said Original Record, Petitioner prepared a printed Appendix to Briefs, containing all things required by Rule 30 of the Rules of Appellate Procedure and served and filed printed copies thereof within the time, in the num-

ber, with the Clerk and on the counsel in strict compliance with the requisites of said Rule 30.

(e) One of said printed copies of said Appendix to Briefs, containing copies of the pleadings and other papers and proceedings in the trial court and being in itself, as a matter of law, a sufficient record upon which said Court of Appeals could and did base its Judgment and Opinion, sought to be reviewed, is filed under separate cover with the Clerk of the Supreme Court in place and instead of the certified transcript of record required by Rule 21 of the Supreme Court Rules.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

The United States Court of Appeals, Fifth Circuit, has decided a federal question in a way in conflict with the decision of said Court in **Schlagenhauf v. Holder**, 379 U.S. 104, 85 S.Ct., 234, 13 L.Ed.2d 152.

STATUTORY JURISDICTION OF SUPREME COURT

28 U.S.C.A. 1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

QUESTION PRESENTED FOR REVIEW

The Court of Appeals in its Opinion stated as follows:

1. "The sole issue in this case is whether the District Court could properly dismiss Appellant's (Theresa M. Bodnar) case, without prejudice, after she had refused to submit to a mental examination for the purpose of determining whether she was mentally competent to understand the nature and effect of the litigation she had instituted, so that if needed a guardian ad litem could be appointed."

Petitioner states the question presented for review to be as follows:

2. "Did the Trial Court have jurisdiction over the subject matter or the power to enter that certain order requiring Plaintiff, Theresa M. Bodnar, Appellant, to submit to an examination by doctors for the purpose of determining whether she was mentally competent to understand and comprehend the nature and effect of the litigation; and was such an order valid or void?

THE CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The judicial power of the United States is set forth in Article III, Section 2 of said Constitution and reads as follows:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; between a State and citizens of another State; — between citizens of different States; — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

Rule 35 (a) of the Federal Rules of Civil Procedure reads as follows:

"Rule 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS (a) Order For Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

Rule 17(c) of the Federal Rules of Civil Procedure reads as follows:

> "Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

Rule 12 (h) (3) of the Federal Rules of Civil Procedure reads as follows:

> "(3) Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction over the subject matter, the Court shall dismiss the action."

Rule 60 (b) (4) reads as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . .
>
> (4) the judgment is void; . . . .

CONCISE STATEMENT OF CASE

Neither the District Court nor the Court of Appeals made any decision upon the merits of the civil case before it. The District Court dismissed the same because Petitioner would not submit herself to an examination as to her mental capacity to enable the Court to appoint a Guardian Ad Litem for her if necessary. The Court of Appeals in its Opinion stated:

> "A Trial Court is not powerless to ascertain whether a litigant is competent and if it finds that he is not, to appoint a Guardian Ad Litem."
>
> * * *
>
> "The District Judge, with ample factual basis for apprehending Appellant's incompetence, granted the motion. Appellant nevertheless refused to comply with this order. In view of this deliberate refusal to comply with the order, the Court dismissed the case without prejudice January 26, 1970.
>
> Appellant took no appeal from the final judgment of dismissal, but she did file a petition of mandamus in this Court. We dismissed the petition.
>
> With the judgment now final and unappealable, Appellant filed a F.R.Cic.P. 60(b) (4) motion in the Trial Court in which she sought to vacate the judgment of dismissal on the ground that it was void for want of jurisdiction. F.R.Civ.P. 60(b) (4). The Court denied the 60(b)

motion. The Court had plenary power under F.R.Civ.P. 17(c), of F.R.Civ.P. 35(a), to order the examination of Appellant under appropriate protective restrictions as to which there can be no complaint here."

ARGUMENT

The latest case as to the validity and construction of Rule 35 (a) is Schlagenhauf vs. Holder, 379 U.S. 104 85 S.Ct. 234, 13 L.Ed.2d 152. The first paragraph in the opinion in the above case reads as follows:

> "This case involves the Validity and Construction of Rule 35 (a) of Federal Rules of Civil Procedure as applied to the examination of a defendant in a negligence action."

On page 250 of the Supreme Court Report there was stated the following:

> "While the party seeking Rule 35 discovery need not prove his case before obtaining an order for discovery, it is incumbent upon him affirmatively to demonstrate: (1) the probability that the adverse party's physical and mental condition is relevant and proximate in point of time to the underlying issues of the litigation and that such condition is in controversy; and (2) good cause to believe that a physical or mental examination would best serve to promote the ascertainment of truth and that other measures of discovery of proof are less satisfactory considering the laws solicitude for a party's privacy."

The truth concerning the ownership of joint bank accounts after the death of one joint tenant has not the slightest connection with the mental competency of Petitioner to comprehend and understand the nature of her suit. It is apparent on the face of the Opinion of the Court of Appeals that the District Court and said Court of Appeals were each of the opinion that it had the power to determine the mental competency of a party to a suit, irrespective of any of the issues in the case and in direct conflict with the holding of the Supreme Court in the **Schlagenhauf Case,** which is the leading case on mental examination of parties to suits and has been cited many times by different Courts of Appeals.

The opinion and judgment sought to be reviewed, if permitted to stand in the Federal Reports, in all probability, will result in confusion, as to the holding in the **Schlagenhauf Case** causing needless work in the future for Federal Appellate Courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing petition was furnished by mail to the attorneys of record, as required by law, this 23rd day of August, 1971.

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